# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-666

HAROLD BISHOP, et al.,
PETITIONERS,

*v.*

JOHN FURTADO and GERALD SOUSA,
RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS X. BELLOTTI
*Attorney General*
LEE CARL BROMBERG
*Special Assistant*
*Attorney General*
31 Milk Street
Boston, Massachusetts 02109
(617) 426-6464

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

## Table of Citations

### *Cases*







### *Constitutional Provisions*



### *Statutes*



### *Miscellaneous*

# In the
# Supreme Court of the United States

OCTOBER TERM, 1979

---

No.

---

HAROLD BISHOP, et al.,
PETITIONERS,

*v.*

JOHN FURTADO and GERALD SOUSA,
RESPONDENTS.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

The petitioners Harold Bishop, et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 26, 1979.

---

[1] Petitioners, prison administrators and corrections officers, are Harold Bishop, William Butler, Frederick Butterworth, Donald Camara, Philip Carvalho, Lee Davis, Leo Flanagan, Wilfred Forcier, Michael Gilmore, John J. Kalinowski, Thomas McLaughlin, James Medas, Roger Paley, Rene Saulnier, and Laurence Scholes.

## Opinions Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. The opinion on post-trial motions of the District Court for the District of Massachusetts, dated April 20, 1978, and the judgment dated September 12, 1978, are unreported and appear as Appendix B hereto.

## Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on July 26, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether a jury instruction on a prisoner's claim of interference with his correspondence is constitutionally adequate where it fails to inform the jury of a public official's right to a qualified immunity defense as defined in *Procunier* v. *Navarette*.

2. May the hearsay affidavit of a deceased attorney be admitted to prove alleged civil rights violations where the proponent has failed to give notice in advance of trial of intention to offer it and fails to make a proper showing of trustworthiness as required by Rule 804(b)(5) of the Federal Rules of Evidence?

3. Whether transfer of a prisoner to segregated confinement constitutes cruel and unusual punishment absent an independent due process violation.

4. Whether liability on a prisoner's claim of excessive force in violation of the Eighth Amendment can be established in the absence of a finding that the challenged conduct was shocking, barbarous, malicious, wanton, brutal or at least reckless?



## Constitutional, Statutory and Evidentiary Provisions Involved

This case involves the Eighth Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act, 42 U.S.C. § 1983, and Rule 804(b)(5) of the Federal Rules of Evidence, each of which is set out, verbatim, in Appendix C hereto.

## Statement of the Case

This case arose in 1970 when two prisoners were routinely transferred to segregation after being cited for drunkenness and for refusing to obey orders. The prisoners claimed excessive force was used. Trial was delayed without explanation until 1978, at which time plaintiffs pressed the claim, discredited in *Meachum* v. *Fano*, 427 U.S. 215 (1976), that their civil rights had been violated by a wrongful transfer. They obtained a substantial damage award based upon acceptance by the trial court of plaintiffs' erroneous theories of constitutional deprivation, and upon mishandling of crucial evidentiary issues. In permitting the judgment on the constitutional claims to stand as not plainly erroneous, the Court of Appeals came into conflict with several recent decisions of this Court.

The plaintiffs below, John Furtado and Gerald Sousa, were prisoners at the Massachusetts Correctional Institute (hereinafter "MCI") at Walpole, the state's maximum security prison, on March 21, 1970. That evening they attended a banquet in the prison auditorium sponsored by a prison drug program. Prison officials observed them

returning to their cells after the banquet, apparently under the influence of alcohol or drugs, and a search of their cells for contraband was ordered. Sousa at first cooperated with a command that he be moved to a segregated area in Cell Block 9. However, he refused to enter Cell Block 9 and had to be forcibly escorted into a cell there. Furtado resisted efforts to remove him from his cell. During a violent struggle he and several officers tumbled into wooden chairs set up in his cell block. He continued to resist and had to be carried out of the cell block by four men who placed him in a separate segregated area. Both men were seen immediately by inmate nurses. Sousa had a torn finger nail. Furtado had bleeding from his mouth and pain in his jaw. Hospital x-rays on the morning of March 23, 1970 revealed no injuries for Sousa. Furtado's x-ray showed "a minute cortical crack in the . . . lower mandible without displacement, separation or deformity." The prisoners were returned to MCI Walpole after their x-rays, where they were temporarily held in separate, segregated areas.

Several correction officers involved in the March 21 transfers wrote disciplinary reports that night in which they charged Sousa and Furtado with being "under the influence," and with refusal to obey a lawful order, and described their resistance to the efforts of the officers to move them. Deputy Superintendent Butterworth reviewed these reports when he returned to the institution in the morning on Monday, March 23, and discussed the incidents with Superintendent Moore and several of the correction officers involved. He also met with State Police Officer Reilly, assigned by the Norfolk County District Attorney to investigate the incidents, at the request of Superintendent Moore that morning. After his investigation, Butterworth recommended to Moore that Sousa and Furtado be transferred to separate departmental segregation units (hereinafter "DSU"), in the interest of maintaining order and security in the general population cell blocks of MCI Walpole.



While housed temporarily in Cell Block 9, Sousa wrote a number of letters. On March 23 he wrote to the Norfolk County District Attorney seeking an investigation of his claim that the correction officers had used excessive force in overcoming his resistance to the transfer order on March 21. By the time this letter was received on March 26, Officer Reilly had already interviewed Sousa and Furtado as part of his investigation. On March 24 Sousa wrote to Dr. Miriam Van Waters, then Superintendent of MCI Framingham; Butterworth returned this letter to Sousa and asked him to delete the name of an officer before sending it out. Sousa wrote Dr. Van Waters again on March 27 and also wrote Chief Judge Charles Wyzanski on March 26. At the trial eight years later Sousa successfully contended that Butterworth had stopped these letters. On April 1, Sousa was visited by Attorney Claude Cross, who came to confer with him on his legal claims at the request of Dr. Van Waters. Cross met with Butterworth before and after he visited Sousa, and was interviewed by State Police Officer Reilly on April 3.

Later in April, the MCI Walpole disciplinary board found Sousa and Furtado guilty of violation of prison rules during their moves on March 21. Upon Moore's recommendation, Commissioner of Correction Fitzpatrick transferred Furtado to DSU Walpole and Sousa to DSU Bridgewater, where they each spent approximately six months. At trial, both prisoners recovered damages for these transfers. Both prisoners were thereafter returned to general population at MCI Walpole.

On December 8, 1970, Sousa and Furtado filed suit under 42 U.S.C. § 1983, claiming that they had been beaten during the transfers of March 21, that officers had filed false

reports to cover up the beatings, and that the false reports, suppression of Sousa's letters and their placement in DSU were all part of a conspiracy by defendant prison administrators and officers to prevent them from asserting legal claims. Extensive discovery proceedings were had over the next several months. However, in October 1971 the case became dormant, and plaintiffs failed to prosecute this action for more than six years.

Plaintiffs filed a second amended complaint just before trial in 1978, alleging, in substance, that their rights under the Eighth Amendment and under the Fourteenth Amendment Due Process Clause had been violated by their transfers to DSU. Trial before a jury of six was marked by frequent disputes about plaintiffs' theories of constitutional violations, which the District Court resolved in favor of plaintiffs in various mid-trial rulings, and in its instructions to the jury. Thus the Court instructed the jury that in 1970, Sousa "had a right to write to Dr. Van Waters and to Judge Wyzanski," and that Butterworth was liable for damages in 1978 if in 1970 he had suppressed the second letter to Dr. Van Waters and the letter to Judge Wyzanski, even in the absence of malice on his part. As proof that Butterworth had stopped the letters the trial court admitted, over defense objection, the hearsay affidavit of the since-deceased Attorney Cross regarding a meeting he had had with Butterworth on April 1, 1970, just after he had conferred with Sousa about his legal claims. The Court also instructed the jury, in substance, that defendants could be held liable for an Eighth Amendment violation if they used improper or unreasonable force on the night of March 21, notwithstanding the absence of malicious, wanton, reckless or shocking conduct by defendants. The trial court also admitted, over defense objection, testimony of Sousa and Furtado about conditions they had experienced in DSU in 1970, in support of their claim that their constitutional rights had been violated by their *transfers* to segregation.



The case was submitted to the jury for verdict and for answers to eleven special interrogatories. The jury answered that certain defendants used improper physical force against Furtado and Sousa, and awarded compensatory damages of $8000 to Furtado and $4500 to Sousa, but declined to award punitive damages. The jury answered further that Butterworth and Scholes had made an intentionally false report or recommendation with the purpose or expectation that it would lead to the segregated confinement of Furtado, and that Butterworth and Saulnier had done the same with respect to Sousa. The jury awarded compensatory damages for segregation of $1000 to Furtado and $9000 to Sousa, but declined to award any punitive damages for segregation. In answer to interrogatory 9, the jury indicated that Butterworth had suppressed "the second letter to Dr. Van Waters". They further answered (interrogatory 10) that Butterworth had suppressed a letter to Judge Wyzanski, and (Interrogatory 11) that Butterworth recommended segregation for Sousa because of his writing to Dr. Van Waters and/or Judge Wyzanski. With respect to each of the three questions regarding Sousa's letters the jury awarded compensatory damages of $1000 and punitive damages of $1000 against Butterworth. After deleting $1000 in compensatory damages against Butterworth as redundant, and adding interest to the date the complaint was filed and attorneys' fees and costs, the District Court entered judgment in the total amount of $56,444.45.

In affirming plaintiffs' damage recovery of $27,500 on appeal, the First Circuit upheld the jury instructions with

respect to the correspondence claims because, although "the rights of prisoners to send routine correspondence were unclear until 1974," "a strong argument can be made that . . . intercepting these letters would violate Sousa's right of access to the courts." Similarly, though the instruction on the Eighth Amendment excessive force claim "is perhaps open to criticism on the ground that it did not expressly require a finding that the force used was shocking or violative of universal standards of decency," it was not so defective as to amount to plain error. The Court of Appeals also upheld "plaintiffs' theory of recovery for segregated confinement" on the ground that it was not plainly erroneous. Though troubled by the District Court's treatment of the issues of trustworthiness and pre-trial notice under Federal Rule of Evidence 804(b)(5) in the admission of dead Attorney Cross' affidavit, the Court of Appeals nonetheless finds indications of trustworthiness and reasons for dispensing with the notice requirement of the rule. The Court of Appeals struck the pre-judgment interest award as not properly submitted to the jury, and vacated the attorney's fees award for recomputation on remand.

## Reasons for Granting the Writ

I. The Holding of the Court of Appeals Stripped Petitioner Butterworth of His Qualified Good Faith Immunity Defense in Conflict With This Court's Decision in *Procunier* v. *Navarette.*

The right of a prison official like Butterworth to a qualified good faith immunity defense against charges of interference with prisoner correspondence in 1970 was made clear by this Court in *Procunier* v. *Navarette,* 434 U.S. 555, 562-63 (1978):



"Under the first part of the *Wood* v. *Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm. Petitioners claim that in 1971 and 1972 when the conduct involved in this case took place there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal right about which they should have known. We are in essential agreement with petitioners in this respect and also agree that they were entitled to judgment as a matter of law."

At a bench conference on the record, the trial court acknowledged the teaching of *Navarette,* which had been issued less than a month prior to the commencement of trial below, but subsequently declined to instruct the jury consistently with it. Instead the trial court instructed the jury that Butterworth could be held liable in damages if the second letter to Dr. Van Waters "was not sent out," or, if the letter to Judge Wyzanski was "even opened." This over-simple instruction permitted the jury to mulct Butterworth in damages for his actions eight years earlier without first making the requisite finding of bad faith, malice, or consciously wrongful conduct on his part, and effectively stripped Butterworth of his qualified immunity defense. The decision of the Court of Appeals upholding the District Court judgment on the correspondence claims

places it in conflict with this Court's opinion in *Navarette,* and re-exposes public officials to damages for their good faith actions taken in areas of unsettled constitutional law.

That Sousa's letters sought legal assistance does not alter Butterworth's right to a qualified immunity defense, contrary to the opinion of the Court of Appeals. *Johnson* v. *Avery,* 393 U.S. 483 (1969), did not alert Butterworth to any requirement that every letter seeking legal assistance must pass untouched. Rather, it established the general right of an inmate to reasonable access to the courts. Moreover, no definitive ruling on prisoner correspondence was available in the First Circuit until *Nolan* v. *Scafati,* 430 F.2d 540 (1970), decided almost five months after the acts here in issue on August 14, 1970 as Justice Stevens recognized in his dissent in *Navarette,* 434 U.S. at 573, n.9.

A prison official, like Butterworth, cannot reasonably be held accountable for a rule of constitutional law in a complex area, which is not explicated by the courts themselves until several months after his alleged improper conduct. Nor should his testimony that he did not stop Sousa's letters deprive him of his good faith defense, particularly where the events in question are eight years old. Butterworth's memory may well have been clouded by several years of scrupulous compliance with constitutional rules established in the interval between 1970 and 1978. He is still entitled to the defense that his actions as found by the jury, if not taken in bad faith, will not support a damage award in an unsettled area of constitutional law. It is crucial to the forthright exercise of discretionary authority by countless public officials that their right to rely upon a qualified good faith immunity defense to damage claims, as enunciated in recent decisions of this Court, not be impaired as the Court of Appeals permitted in the instant case.



## II. The Decision of the Court of Appeals Upholding the Admission of a Hearsay Affidavit Under Federal Rule of Evidence 804(b)(5), Without Requisite Pretrial Notice Raises an Important Issue With Constitutional Implications on Which the Circuit Courts Have Made Conflicting Rulings.

Rule 804(b)(5) of the Federal Rules of Evidence (hereinafter "FRE") provides, where the declarant is unavailable as a witness, for the admission as an exception to the hearsay rule of

> "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

Though troubled by the way the trial court handled the matter, the Court of Appeals here upheld the admission of the hearsay affidavit of a deceased attorney, despite the failure of plaintiffs to provide any advance notice, as mandated by the last sentence of FRE 804(b)(5). In substance,

Attorney Cross stated, in an affidavit he made in December 1970, that at his meeting with Butterworth on April 1, 1970, Butterworth told him he had stopped two letters written by Sousa to Dr. Van Waters and Judge Wyzanski. The circumstances under which plaintiffs produced the Cross affidavit are a particularly egregious example of violation of the notice requirement. Plaintiffs first made the startling maneuver of interrupting their first witness on the first day of trial to call Butterworth, the highest ranking defendant, as their own witness. Then, apparently alerted by something Butterworth said on cross-examination by his own counsel, plaintiffs pulled the Cross affidavit out of their files, with no notice whatsoever, and successfully introduced it, over objection, on their redirect of Butterworth. A clearer violation of the policy behind the pre-trial notice requirement of FRE 804(b)(5) is difficult to imagine. The decision of the First Circuit upholding admission of this hearsay affidavit is contrary to the explicit language of FRE 804(b)(5) and contrary to the weight of sound authority, which insists that "Congress intended that the requirement of advance notice be rigidly enforced." *United States* v. *Oates*, 560 F.2d 45, 72-73, n.30 (2d Cir. 1977); *United States* v. *Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), *reversed without discussion*, en banc, July 20, 1979; *United States* v. *Davis*, 571 F.2d 1354, 1360, n.11 (5th Cir. 1978).

The First Circuit's reading of the legislative history of FRE 804(b)(5), summarized in footnote 13 of the opinion, is consistent with these authorities. Nevertheless, the Court justified its departure from the notice requirement of the rule as follows:

> "If, in upholding the affidavit's admission, we are reading the rule somewhat more liberally than other courts, we do so because, unlike the vast majority of cases interpreting the rule, this is a civil case. Where there is no constitutional right of confrontation implicated by the rule, we think slightly freer play can be given to the discretion of the trial judge in admitting evidence under it. See *United States* v. *Bailey*, supra, 581 F.2d at 350-51; *United States* v. *Medico*, supra, 557 F.2d at 314 n.4. Nevertheless, we warn parties that they fail to give pretrial notice under the rule at their peril, and we expect trial judges to consider carefully statements offered under residual exceptions to the hearsay rule." (A. 21)



It is plain, however, that application of FRE 804(b)(5) in the instant case implicates the right of Butterworth and all the defendants to due process of law just as surely as the right of confrontation is implicated in a criminal case. Defendants are thus entitled to strict adherence to the Federal Rules of Evidence to protect their constitutional rights. Hence the Court of Appeals' ruling, which dispensed with the pre-trial notice requirement, raises an important question and poses a serious conflict with the language of the rule itself and with the other circuits.

Some flexibility has been introduced into the notice requirement, by cases in conflict with the position stated in *Oates* and *Ruffin*, where the failure to give notice was not the fault of the proponent. Thus where the government was surprised at trial by the refusal of a co-defendant or witness to live up to a previous agreement to testify, and defense counsel has an opportunity to prepare to meet them, prior hearsay statements may be admitted. *United States* v. *Bailey*, 581 F.2d 341, 348 (3d Cir. 1978); *United States* v. *Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976). Similarly, where the need to use hearsay statements does not become apparent until mid-trial, the hearsay offered

consists of prior statements by witnesses who appeared at trial, and the proponent gave notice on a Friday of intention to use the hearsay statements the following Monday in rebuttal, the notice requirement will be deemed satisfied, but "only in those situations where requiring pre-trial notice is wholly impracticable." *United States* v. *Iaconetti,* 540 F.2d 574 (2d Cir. 1976). In the instant case, however, the First Circuit has opened a wholesale exemption from the notice requirement for civil cases, and thus has raised a serious conflict with those authorities which have permitted waiver of pre-trial notice under strictly limited circumstances.

Under the circumstances of the instant case, strict enforcement of the pre-trial notice requirement is called for, as enunciated in the legislative history and in *Ruffin* and *Oates.* The constitutional rights implicated by the rule, whether in a civil rights case or a criminal trial, mandate rigid enforcement of the prior notice requirement, to afford full due process protections to defendants. In addition, as one commentator has stated with respect to waivers of the notice requirement:

> "The problem with allowing such an exception is that it has a tendency to swallow the rule. As noted earlier, in *Iaconetti* the court cautioned against waiver of advance notice as a general proposition. But once the trial is in progress, and the statement is presented to the judge, the temptation to admit it is strong. This is illustrated by the *Leslie* case, [542 F.2d 285 (5th Cir. 1976)] where hearsay statements of co-defendants were admitted in rebuttal. The court held that there was no harm because the defendant should have anticipated the use of these statements. Part of the rationale was that 'since the evidence was conflicting . . . the jury could use all the help it could get.' *Leslie, supra,* 542 F.2d at 291.



Stein, "Recent Developments in the Federal Rules of Evidence," *Boston Bar Journal, September* 1979, pp. 20-31, at p. 26. The hearsay statement presented to the judge in mid-trial may be expected always to look like something the defense should have anticipated, and it is likely that it will almost always take the defense by surprise to its unjust disadvantage, in derogation of Congress' stated policy for inserting the pre-trial notice requirement.

In any event, the conflicts among the rulings of the Courts of Appeals indicate the need for guidance from this Court on whether FRE 804(b)(5) can ever be interpreted to waive the pre-trial notice requirement, consistent with the constitutional rights of defendants.

## III. The Theory That Petitioners' Transfer of Respondents to Segregation for Improper Motives Violates Respondents' Rights Under the Eighth and Fourteenth Amendments Is Erroneous as a Matter of Law and in Conflict With Rulings of This Court.

Plaintiffs contended that their transfers to DSU were engineered by defendants as a cover-up of use of excessive force on the night of March 21 and that they were therefore entitled to recover, under the Eighth and Fourteenth Amendments, for the "punishment" of the transfers and for the conditions they endured in DSU.[2] The jury awarded substantial damages based upon this claim, which, however, is erroneous as a matter of law.

In *Meachum* v. *Fano,* 427 U.S. 215 (1976), this Court held that no liberty interest within the protection of the Due Process Clause of the Fourteenth Amendment is implicated by the transfer of a Massachusetts state inmate

---

[2] Plaintiffs explicitly eschewed an Eighth Amendment conditions claim in favor of an attack upon the transfers. See Appendix, p. A-10.

from one prison within the state to another with more severe conditions of confinement. The companion case of *Montanye* v. *Haymes,* 427 U.S. 236, 242 (1976), in holding due process protections inapplicable to intrastate transfer of a New York state prisoner, made it clear that characterization of the transfer as disciplinary or punitive was immaterial. The Court concluded that a prisoner facing transfer to higher custody status has no right to Due Process Clause protections of any kind, "absent some right or expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye,* 427 U.S. at 242. Due process claims by Massachusetts prisoners who had been transferred to higher custody status were dismissed because

> "Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct,"

427 U.S. at 226, and because

> "no legal interest or right of these [prisoners] under Massachusetts law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances."

*Id.* at 228. In words strikingly applicable to plaintiffs' contentions in the trial below, the *Meachum* Court stated that a prisoner had no right to Fourteenth Amendment Due Process protections "as long as prison officials have



discretion to transfer him *for whatever reason or for no reason at all*" (emphasis added). *Id.*

Shortly after *Meachum* and *Montanye* were handed down, the Court of Appeals for the First Circuit had occasion to address and reject a series of inmate Fourteenth Amendment claims almost identical to that asserted here by plaintiffs. *Daigle* v. *Hall,* 564 F.2d 884 (1st Cir. 1977) transfer to DSU); *Four Certain Unnamed Inmates* v. *Hall,* 550 F.2d 1291 (1st Cir. 1977) (same); *Lombardo* v. *Meachum,* 548 F.2d 13 (1st Cir. 1977) (transfer to higher custody status prison). In *Daigle*, 564 F.2d at 885, the Court stated:

> "in *Montanye* v. *Haymes,* . . . the Supreme Court held that '[a]s long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.' *Id.* at 242, 96 S.Ct. at 2547. It is clear to us that both of these conditions exist in this case. First, the DSU is part of the Massachusetts prison system to which these inmates were sentenced. We are pointed to nothing in the order of the sentencing judge that puts the DSU beyond the bounds of their sentences. No liberty interest springs up to protect inmates from transfer to DSU simply because they are originally placed in the less unpleasant surroundings of the general population. *See Meachum* v. *Fano* . . .
>
> * * *
>
> "Mass. Gen. Law Ann., ch. 127, § 39 (1974), authorizes transfer to the DSU of inmates 'whose continued retention in the general institution population is detrimental to the program of the institution.' Retention in the general population may become 'detrimental'

> for any number of reasons. The statute does not 'confer upon individual inmates a right not to be transferred absent a showing that specified events have occurred.' *Lombardo, supra,* 548 F.2d at 15."

*Meachum, Daigle* and the companion cases foreclose the Fourteenth Amendment as a basis for the award of compensatory damages for segregated confinement which the plaintiffs recovered below. These cases also foreclose an Eighth Amendment "disproportionality" claim as the basis for the damage award, since "DSU is part of the Massachusetts prison system to which these inmates were sentenced," *Daigle, supra,* 564 F.2d at 885, and since punitive intent is irrelevant to the constitutionality of a prison transfer. *Montanye, supra.* These cases similarly foreclose plaintiffs' claim that an "arbitrary and capricious" transfer would support their segregation damages award. *See also Estelle* v. *Gamble,* 429 U.S. 97, 103, n.7 (1977).

In the case of convicted offenders such as plaintiffs, their punishment is their incarceration and "the protection afforded by the Eighth Amendment is limited. After incarceration, only the 'unnecessary and wanton infliction of pain, . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Ingraham* v. *Wright,* 430 U.S. 651, 669 (1977). Prisoners are of course not without a remedy under the Eighth Amendment where the conditions of their incarceration fall below civilized norms. *E.g., Hutto* v. *Finney,* 437 U.S. 678, 685 (1978). However, plaintiffs have eschewed this type of Eighth Amendment claim and, in the words of the Court of Appeals, "contended that the punishment exacted was cruel and unusual because it was arbitrarily imposed to cover up brutality and was grossly disproportionate to whatever offenses they had committed". That theory is erroneous as a matter of law and is a reformulation of precisely the kind of due process claim that this Court rejected in *Meachum.*



## IV. The Trial Court's Jury Instruction on the Eighth Amendment Use of Excessive Force Claim, Which the Court of Appeals Upheld as Not Plainly Erroneous, Is in Conflict With the Rulings of Other Circuit Courts and With the Principles Announced by the Supreme Court.

The trial court's charge to the jury on the Eighth Amendment use of force claim noted that prisoners retain "the right not to be treated with unnecessary roughness" and continued as follows:

> "Under the facts as you find them, did any defendant use unreasonable force upon one or both of the plaintiffs. By unreasonable force, I do not mean that you should draw fine, exact lines. A prison is not a social gathering. As a wise judge has put it:
>
> > 'The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a Court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.'[3]

[3] The trial court was quoting from *Johnson* v. *Glick,* 481 F.2d 1028, 1033 (2nd Cir.) (Friendly, J.), *cert. denied sub nom. John* v. *Johnson,* 414 U.S. 1033 (1973).

> "It would not be practical; it would hamstring a prison guard from using force at all when force was required if he had to fear a lawsuit every time. The law is not like that. I instruct you that the plaintiffs must show that a guard used excessive force, excessive to the degree that a reasonable guard would realize, on the facts known to him when he did it, that it was excessive."

With respect to punitive damages the trial court said:

> The law allows you to award punitive damages if any defendant's conduct was so outrageous that it shocks you, you may award extra damages, sometimes called smart money, in order, shall we say, to teach him a lesson or serve as an example."

Noting that the defendants did not object to the instructions before the jury retired, the Court of Appeals upheld them as not plainly erroneous, although the Court commented that "the charge given here is perhaps open to criticism on the ground that it did not expressly require a finding that the force used was shocking or violative of universal standards of decency" (pp. A-26, A-27). Petitioners contend that since the criticism leveled by the Court of Appeals in its own opinion is valid, the trial court's charge constitutes plain, and serious, error in that it lowers the threshold for establishing a civil rights violation contrary to principles enunciated by this Court and by other circuit courts. Thus in *Estelle* v. *Gamble,* 429 U.S. 97, 104 (1976), this Court set the threshold for constitutional liability substantially higher than negligence by requiring plaintiff to show "deliberate indifference to serious medical needs"



in order to make out an Eighth Amendment claim. The minimum standard of deliberate indifference "is consistent with the judgment of many lower courts that actions of state officials must be characterizable as 'wanton,' 'reckless,' or 'grossly negligent' in order to state a claim under section 1983, particularly where an isolated incident of abuse occurred." *Developments in the Law—Section 1983 and Federalism,* 90 Harvard Law Review 1133, 1206 (1977). See cases collected *id.* at note 100. A similar high threshold for establishing excessive use of force in violation of the Eighth Amendment has been set by other Courts of Appeals. *Mukmuk* v. *Commissioner of Department of Correctional Services,* 529 F.2d 272, 277-78 (2d Cir.), *cert. denied* 426 U.S. 911 (1976); *Meredith* v. *State of Arizona,* 523 F.2d 481, 482-84 (9th Cir. 1975); *Howell* v. *Cataldi,* 464 F.2d 272, 282 (3d Cir. 1972). Here under the trial court's charge, the jury did not have to find defendant's conduct shocking in order to hold them liable. Indeed the fact that the jury did not award punitive damages suggests that they were not shocked by defendants' conduct, given the instruction on punitive damages. Defendants should not be held liable for a constitutional violation unless their conduct reaches the requisite level of impropriety. The standard for excessive force in violation of the Eighth Amendment is a matter on which the guidance of the Supreme Court is urgently needed, to prevent further confusion, inconsistency and injustice in the lower courts.

## Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI
*Attorney General*
LEE CARL BROMBERG
*Special Assistant*
*Attorney General*
31 Milk Street
Boston, Massachusetts 02109
(617) 426-6464

Dated: Boston, Massachusetts
October 24, 1979



APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 78-1482

JOHN FURTADO, ET AL.,
PLAINTIFFS-APPELLEES,
*v.*
HAROLD BISHOP, ET AL.,
DEFENDANTS-APPELLANTS.

No. 78-1483

JOHN FURTADO, ET AL.,
PLAINTIFFS-APPELLANTS,
*v.*
HAROLD BISHOP, ET AL.,
DEFENDANTS-APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. BAILEY ALDRICH, *Senior Circuit Judge**]

Before
COFFIN, *Chief Judge,*
BOWNES, *Circuit Judge,*
PETTINE, *District Judge.***

*Lee Carl Bromberg*, Special Assistant Attorney General, Department of Correction, with whom *Francis X. Bellotti*, Attorney General, was on brief, for Harold Bishop, et al.
*Max D. Stern*, with whom *Jonathan Shapiro, Stern & Shapiro*, and *Michael Avery*, were on brief, for John Furtado, et al.

* Of the U.S. Court of Appeals for the First Circuit, sitting by designation.
** Of the District of Rhode Island, sitting by designation.

July 26, 1979

BOWNES, *Circuit Judge.* This case stems from two separate but related incidents at the Massachusetts Correctional Institution (MCI) at Walpole on March 21, 1970. Prison officials observed prisoners John Furtado and Gerald Sousa returning to their respective cells after attending a banquet at the auditorium sponsored by inmates involved in a prison drug program. Sousa had consumed some home brew and his gait and general appearance made it obvious that he was less than sober. Furtado later testified that he had nothing to drink at the banquet. Both men went into their cells shortly before ten o'clock and presumably fell asleep. Based on the observations made and because it was known that both had been at the banquet, the prison officials, after going through the appropriate chain of command, decided to move Sousa and Furtado out of their cells and search for contraband. As the guards attempted to usher him to a segregated area in Cell Block 9, a melee erupted between Sousa and the guards. There was further turmoil when a second group of guards attempted to move Furtado out of his cell. Both men claimed to have been beaten by the guards. Furtado was injured more seriously than Sousa; he bled profusely, was obviously in pain and an X-ray showed that his jaw was slightly fractured. He was taken to the prison hospital.

While Furtado was in the prison hospital, Sousa wrote a series of letters complaining that he and Furtado had been brutally and unjustly beaten and seeking redress. On March 23, he wrote to the Norfolk County District Attorney's office. By the time this letter was delivered on March 26, State Police Officer Reilly had already been called in by Walpole Superintendent Moore to investigate the incidents. On March 24, Sousa wrote to Dr. Miriam Van Waters, a former Superintendent of MCI Framingham whom he knew, but Deputy Superintendent Butterworth returned the letter to Sousa and asked him to delete the name of an officer he accused of directing the beatings. Sousa wrote Dr. Van Waters again on March 27 and also wrote Chief Judge Charles Wyzanski of the United States District Court.



Furtado and Sousa had, themselves, been the subject of several disciplinary reports written by prison officers involved in the incidents. Deputy Superintendent Butterworth, who had commenced his own investigation of the incident on March 23 and had read the reports, recommended to Superintendent Moore that Furtado and Sousa be transferred to departmental segregation units (DSU). In April, upon Moore's recommendation, Commissioner of Correction Fitzpatrick transferred Furtado to DSU Walpole and Sousa to DSU Bridgewater, where they spent approximately six months.[1]

In December, 1970, Furtado and Sousa filed a lawsuit under 42 U.S.C. § 1983 against various guards and prison officials and also moved for a preliminary injunction asking the district court to enjoin defendants from intercepting and reading any correspondence from plaintiffs to and from their attorneys, to order defendants to allow plaintiffs or their representatives to interview plaintiffs and potential witnesses in privacy and to permit nonlawyers to conduct the interviews, to enjoin defendants from interfering in any way with the conduct of the lawsuit, and to restore plaintiffs to the general prison population. After a hearing, the district court granted, with some modification, the relief requested except for transfer out of segregation to the general prison population.

After a long unexplained delay, the case was assigned

---

[1] Both men were found by a disciplinary board to have violated prison rules, but the Board's action in Sousa's case came one day *after* Moore had recommended Sousa's transfer.

to another judge for trial in November of 1977. Prior to the start of the scheduled jury trial in March of 1978, plaintiffs filed a second amended complaint, which was assented to by defendants. The complaint alleged unjustified assaults and beatings and use of excessive force against both plaintiffs. It asserts that Sousa was held under conditions of solitary confinement at DSU Bridgewater for six months without cause, with no hearing or notice of charges, that the defendants knew or should have known that the reports made against Sousa were false, and that he was transferred to DSU Bridgewater "at least in part" because he attempted to obtain legal redress for the beating administered on March 21, 1970, "by attempting to write to the United States District Court and by attempting to mail letters seeking legal assistance, which attempts were frustrated by defendant Butterworth." Essentially the same allegations were made as to Furtado's confinement in the segregation unit at Walpole. Damages were sought for the beatings, for the confinement in segregation, for the alleged deprivation of due process and deprivation of their right to communicate with the outside world and the courts.

Eleven special interrogatories were submitted to the jury which can be summarized as follows: (1) was improper physical force applied on the night of March 21, 1970; (2) which of the defendants participated in the application of such force, either directly or by failing to stop it (the defendants were listed with a space for a yes or no answer opposite each name); (3) the amount of compensatory damages for the use of improper physical force; (4) the amount of punitive damages; (5) did any defendants make an intentionally false report to cover up the events of the night of March 21, 1970 (with a list of defendants' names for checking if applicable); (6) did any of the defendants make an intentionally false report or



recommendation with the purpose or expectation that it would lead to segregated confinement (with a list of defendants' names for checking if applicable); (7) compensatory damages for segregation; (8) punitive damages for segregation; (9) did defendant Butterworth suppress the second letter to Dr. Van Waters; (10) did defendant Butterworth suppress a letter to Judge Wyzanski; and (11) did defendant Butterworth recommend segregation for Sousa because of his writing to Dr. Van Waters and/or Judge Wyzanski—with an additional question as to the amount of compensatory and punitive damages if applicable.

In response to the interrogatories, the jury found that three types of wrongdoing had occurred: (1) that certain defendants used or countenanced the use of excessive force against Furtado and Sousa; (2) that guards Scholes and Saulnier and Deputy Superintendent Butterworth made false reports or recommendations with the purpose or expectation they would lead to segregated confinement for Furtado and Sousa; and (3) that Butterworth suppressed the second letter to Dr. Van Waters and the letter to Judge Wyzanski and recommended segregation for Sousa because of his letter writing. The jury awarded Furtado $8,000 and Sousa $4,500 in compensatory damages for the use of excessive force against them, Furtado $1,000 and Sousa $9,000 in compensatory damages for segregated confinement, and Sousa $3,000 in compensatory damages and $3,000 in punitive damages for Butterworth's mail suppression and recommendation of segregation. After deleting $1,000 in compensatory damages against Butterworth as redundant, the district court entered a judgment of $56,444.45, which included prejudgment interest, costs, and attorney's fees.

The defendants have appealed the entire judgment, and the plaintiffs have cross-appealed from the portion of the judgment concerning attorney's fees. The issues on appeal

cluster around four aspects of the case: (1) the recovery of damages for the plaintiffs' segregated confinement; (2) evidentiary rulings; (3) the judge's instructions to the jury; and (4) prejudgment interest and attorney's fees. We address these issues in order.

### *THE RECOVERY OF DAMAGES FOR SEGREGATED CONFINEMENT*

The defendants have concentrated much of their effort on attacking the award of damages against Saulnier, Scholes, and Butterworth for making false reports or recommendations to bring about the plaintiffs' transfers to segregated confinement. Saulnier wrote a report in which he accused Sousa of being "very high on drugs or booze," refusing to go to Block 9, and fighting, kicking, and taking a swing at an officer; he recommended the "[m]aximum penalty this man can get." Scholes' report similarly accused Furtado of refusing to obey orders to move and of hitting, kicking, and biting officers. As noted above, Butterworth conducted an investigation and ultimately recommended the transfers.

The plaintiffs' theory, accepted by the jury, was that the guards had attacked them and that certain of the defendants had made false reports and recommendations in order to "cover up" the assaults and beatings with the purpose or expectation that such reports would result in segregated confinement. According to this theory, defendants were liable for plaintiffs' confinement in segregation because it constituted arbitrary and capricious or grossly disproportionate punishment for drinking and refusing to obey orders,[2] in violation of the eighth amendment and the

[2] Sousa, but not Furtado, admitted drinking home brew on the evening in question. Both men arguably refused to obey certain orders to move; there was evidence they protested because Superintendent Moore had promised an end to "shakedowns" of cells after 10:00 p.m.



substantive due process guarantee of the fourteenth amendment and because it was imposed in part to frustrate plaintiffs' right of access to the courts, in violation of the first amendment and the due process clause of the fourteenth amendment.

As we understand defendants' position, they contest plaintiffs' recovery of damages for segregated confinement on four grounds. First, they contend, more emphatically in oral argument than in their briefs, that they had no notice that the plaintiffs sought damages for conditions in segregation on the theory that the transfers to segregation for improper motives violated the eighth and fourteenth amendments. After carefully reviewing plaintiffs' second amended complaint, we find no merit in this position. The complaint sufficiently pled the plaintiffs' theory of recovery for segregation,[3] and, in the detailed description of the privileges lost in segregation and of the vile conditions endured by Sousa at DSU Bridgewater, there was ample warning that the plaintiffs were seeking damages for the conditions of segregated confinement.[4] Defendants

[3] The complaint contained specific allegations that some of the defendants had made false reports that the plaintiffs had created a disturbance and that, as a result, Sousa and Furtado were transferred to DSU. There were further allegations that the "acts of defendants in causing the plaintiffs to be transferred to the departmental segregation units . . . were arbitrary and capricious, deprived plaintiffs of their rights to due process of law . . . [and] to be free of cruel and unusual punishment . . . as guaranteed by the Eighth and Fourteenth Amendments . . . ."

[4] The complaint stated that in segregation the plaintiffs were held in virtual twenty-four hour lockup, were not permitted to have personal belongings, to watch television, or to listen to the radio, were denied access to rehabilitative programs, and had their visits and correspondence severely curtailed. The following description of conditions at DSU Bridgewater was given:

> DSU Bridgewater . . . was located in an ancient and dilapidated building. There was no plumbing. Plaintiff [Sousa] had to use a dry pot which was emptied only once per day. His cell was infested with cockroaches. Above the segregation unit were held violent uncontrollable patients from the

also had the benefit of plaintiffs' proposed jury instructions, which were filed several days before trial and in which plaintiffs claimed a right not to be arbitrarily singled out for punitive and degrading treatment and sought damages for time spent in segregation.

Second, and more fundamentally, defendants contend that plaintiffs' theory of recovery under the eighth and fourteenth amendments was erroneous as a matter of law. They reason that, in the wake of the Supreme Court decisions in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), and our own post-*Meachum* decisions in *Daigle* v. *Hall*, 564 F.2d 884 (1st Cir. 1977); *Four Certain Unnamed Inmates* v. *Hall*, 550 F.2d 1291 (1st Cir. 1977), and *Lombardo* v. *Meachum*, 548 F.2d 13 (1st Cir. 1977), the plaintiffs' transfers were not actionable.

The initial difficulty with this argument is that, as we read the record, it was not raised below.[5] We will not ordinarily consider on appeal grounds for reversal that were not urged upon or considered by the district court.

---

hospital portion of M.C.I. Bridgewater. These patients disturbed DSU inmates by making constant noise and by urinating on their floor. In spite of the above unhygienic conditions, DSU Bridgewater inmates were permitted to wash in a sink only once per day and shave and shower twice per week.

[5] Defendants' trial counsel did object strenuously to the admission of evidence of the conditions at the DSU, but he did so on the ground that the named defendants could not be held responsible for the transfers (which were ultimately ordered by the Commissioner of Correction) or for the conditions in the DSU. When he moved for a directed verdict for Butterworth, it was on similar grounds. No objections were taken to the judge's charge or to interrogatories encompassing plaintiffs' theory of recovery. Nowhere in the record can we find any objections to the trial judge that plaintiffs' theory of recovery for segregation was, as appellate counsel now characterizes it, "bogus." To the contrary, in defendants' requests for jury instructions, they appear to concede liability if they "acted intentionally or maliciously or in bad faith to segregate the plaintiffs from the general population."



*E.g.*, *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 891, 894 (1st Cir. 1979); *Dobb* v. *Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974). Although we have acknowledged our power to notice plain error in order to avert a clear miscarriage of justice, *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), we only exercise that power if the new ground is "so compelling as virtually to insure appellant's success." *Dobb* v. *Baker*, *supra*, at 1044. This is not the case here.

The Supreme Court's prison transfer decisions did not clearly foreclose plaintiffs' theory of recovery of damages for their segregated confinement. In *Meachum* v. *Fano*, *supra*, 427 U.S. at 216, and *Montanye* v. *Haymes*, *supra*, 427 U.S. at 242, the Court held that the due process clause of the fourteenth amendment does not require a hearing before a prisoner is transferred from one state prison to another having harsher conditions, unless a state law or practice creates a liberty interest in continued confinement at the first prison by conditioning transfers on misconduct or other events. In *Meachum*, the Supreme Court reversed a decision of this court, *Fano* v. *Meachum*, 520 F.2d 374 (1st Cir. 1975), holding that transfers from MCI Norfolk to MCI Walpole and Bridgewater implicated a liberty interest and required certain due process protections. Interpreting the Supreme Court's decisions, we held in *Daigle* v. *Hall*, *supra*, 564 F.2d at 885-886, and *Four Certain Unnamed Inmates* v. *Hall*, *supra*, 550 F.2d at 1292, that a prisoner's transfer to DSU Walpole did not implicate any liberty interest or violate procedural due process of law. *See also Sisbarro* v. *Warden, Massachusetts State Penitentiary*, 592 F.2d 1, 2-4 (1st Cir. 1979) (interstate transfers); *Lombardo* v. *Meachum*, *supra*, 548 F.2d at 13-15 (transfer from MCI Norfolk to MCI Walpole). All of these cases addressed an issue of procedural due process: what, if any, procedural protections must accompany a transfer.

Nothing in these decisions expressly ruled out a challenge to a transfer to segregation on the ground that it violated constitutional rights other than the right to procedural due process of law.[6] In fact, in *Montanye* v. *Haymes, supra,* 427 U.S. at 242, the Supreme Court indicated that the conditions or degree of a prisoner's confinement could be "otherwise violative of the Constitution," and the dissenters understood the Court to agree that Montanye would have a cause of action to the extent he claimed his transfer was in retribution for the exercise of his first amendment rights. *Id.* at 244 and n.*.[7] Defendants themselves do not seriously dispute that plaintiff's transfers to segregation were actionable if they violated plaintiffs' right of access to the courts, one theory of recovery advanced.

By the same token, plaintiffs' theory that recovery for segregated confinement could also be based upon the eighth and fourteenth amendments is not commonplace and widely accepted. Although it is established that conditions in segregation can be so barbaric as to constitute cruel and unusual punishment, *e.g., Hutto* v. *Finney,* 437 U.S. 678, 685 (1978), plaintiffs freely admit that they did not pursue this type of eighth amendment claim. Rather, they contended that the punishment exacted was cruel and unusual because it was arbitrarily imposed to cover up brutality and was grossly disproportionate to whatever offenses

[6] Although defendants seize upon language in *Meachum* v. *Fano,* 427 U.S. 215, 228 (1976), to the effect that "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all," we understand this statement to describe the applicable Massachusetts law in that case and not to constitute a pronouncement that a transfer can never violate the Constitution.

[7] Montanye had pursued this claim below and the Second Circuit found that he had standing to raise a first amendment challenge to his transfer. *Haymes* v. *Montanye,* 547 F.2d 188, 189-90 (2d Cir. 1976), *cert. denied,* 431 U.S. 967 (1977). *Compare Sisbarro* v. *Warden, Massachusetts State Penitentiary,* 592 F.2d 1, 4 (1st Cir. 1979) (no first amendment claim articulated).



they had committed. It is true that the Supreme Court has stated many times that a grossly disproportionate penalty can offend the eighth amendment, *e.g., id.* at 685; *Weems* v. *United States,* 217 U.S. 349, 367 (1910), but the Court does not appear to have applied this concept to prison disciplinary measures such as segregation.[8] Nevertheless, a few lower courts have done so. *Chapman* v. *Kleindienst,* 507 F.2d 1246, 1252 (7th Cir. 1974); *Wright* v. *McMann,* 460 F.2d 126, 132-33 (2d Cir.), *cert. denied,* 409 U.S. 885 (1972); *Hardwick* v. *Ault,* 447 F. Supp. 116, 125-27 (M.D. Ga. 1978). *See Bono* v. *Saxbe,* 450 F. Supp. 934, 944 (E.D. Ill. 1978); *Fitzgerald* v. *Procunier,* 393 F. Supp. 335, 342 (N.D. Cal. 1975). Similarly, some courts have indicated that segregated confinement amounts to cruel and unusual punishment or a violation of substantive due process if it is imposed arbitrarily and without basis. *Wilwording* v. *Swenson,* 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied,* 420 U.S. 912 (1975); *Black* v. *Warden, United States Penitentiary,* 467 F.2d 202, 203-04 (10th Cir. 1972); *United States ex rel. Bennett* v. *Prasse,* 408 F. Supp. 988, 999 (E.D. Pa. 1976). We, ourselves, have recognized that punishment of prisoners may not be "extremely disproportionate, arbitrary or unnecessary." *O'Brien* v. *Moriarty,* 489 F.2d 941, 944 (1st Cir. 1974). *See Feeley* v. *Sampson,* 570 F.2d 364, 371 (1st Cir. 1978); *Nadeau* v. *Helgemoe,* 561 F.2d 411, 419 (1st Cir. 1977). Given the state of the law in this area, we certainly cannot say that plaintiffs' theory of recovery for segregated confinement was plainly erroneous.

Defendants' third argument, which was made in various forms below,[9] is that there was insufficient evidence to

[8] *Hutto* v. *Finney,* 437 U.S. 678 (1978), did involve punitive isolation, but there the Supreme Court upheld a thirty day limitation on such confinement in an Arkansas prison on the theory that conditions were barbarous rather than that the punishment was grossly disproportionate. *Id.* at 685-88.

[9] *See* n.5, *supra.*

impose liability on Butterworth, Scholes, and Saulnier for transfers of plaintiffs to segregation. Defendants reason that, because the decisions to transfer were ultimately made by Commissioner of Correction Fitzpatrick,[10] who was not a defendant, on the recommendation of Superintendent Moore, who was dropped as a defendant, their false reports and recommendations were not proved to have caused the transfers to segregation. In a variation on this theme, defendants contend that Moore and Fitzpatrick may have had their own valid reasons for effecting the transfers, and that there was an "unrebutted, rational and nondiscriminatory basis" for the transfers, *Laaman* v. *Perrin,* 435 F. Supp. 319, 328 (D. N.H. 1977), in Sousa's drinking and both plaintiffs' refusals to obey orders.

We think there was sufficient evidence to impose liability on Butterworth, Scholes, and Saulnier for the transfers. Section 1983 is to be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658, 663 (1978). When a person's conduct is a "substantial factor and a material element" in bringing about a foreseeable injury, he can be held liable for that injury. *Hilliard* v. *Williams,* 516 F.2d 1344, 1351 (6th Cir. 1975), *vacated on other grounds,* 424 U.S. 961 (1976). *See* W. Prosser, *Law of Torts,* § 42, at 244-48 (4th ed. 1971). Here, there was evidence from which the jury could infer that defendants made false reports and recommendations with the purpose or expectation that they would lead to segregated confinement, and that their actions caused Moore to advocate and Fitzpatrick to order the transfers.[11] This

[10] Fitzpatrick had the statutory authority to transfer. Mass. Gen. Laws ch. 127, § 39.

[11] Defendants complain that the jury never actually found that defendants' reports and recommendations actually caused the transfers. It is true that the interrogatories only called for the jury to determine whether the defendants intended or expected that segregated confinement would result. We do not think this entitles defendants to relief, however, because they never objected to the interrogatories or pointed out any deficiencies in them before they were submitted to the jury. In addition, we think it is highly likely that the jury believed defendants' actions caused the transfers, especially in light of evidence that Butterworth specifically relied upon reports by Saulnier and Scholes in making his recommendation to Moore (who had only been on the job for two weeks) and that Moore mentioned the Saulnier and Scholes reports in his letters to Fitzpatrick, and in light of the trial judge's instruction that the plaintiffs had the burden of showing that the defendants "fooled" Moore. Although defendants claim at one point in their brief that the trial judge prevented them from proving that Moore's independent judgment regarding the transfers broke the chain of causation, we do not read the record this way.



satisfied plaintiffs' burden of proving that it was more likely than not that defendants foresaw and helped bring about the transfers to segregation. *Hilliard* v. *Williams, supra,* at 1351. *See Spears* v. *Conlisk,* 440 F. Supp. 490, 498 (N.D. Ill. 1977).

Fourth, and last, defendants assert that, even if they could be held responsible for the transfers, damages were not properly imposed on them for the conditions of confinement in segregation units. This argument stems from two premises: that the only right arguably violated by the transfers to segregation was the right of access to the courts, and that only nominal damages were due for any violation of this right because plaintiffs were able to secure counsel, file this lawsuit, and prevail. This argument, too, was not voiced below. We see no plain error in the award of damages for segregation. For the reasons stated above, we are unconvinced that the only right defendants violated was plaintiffs' right of access to the courts. In any event, we think that damages for segregated confinement were appropriate to the extent that defendants attempted to punish or deter the exercise of that right. *Sostre* v. *McGinnis,* 442 F.2d 178, 189, 205 and n.52 (2d Cir. 1971), *cert.*

*denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972). *See Laaman* v. *Perrin, supra*, 435 F. Supp. at 326 and cases cited therein. The measure of such damages is clearly the difference between the harsher and, as to Sousa, deplorable conditions suffered in segregation and the conditions that prevailed in the general prison population. We find nothing shocking or even unreasonable as to the damages awarded for the confinement in segregation, $1,000 to Furtado and $9,000 to Sousa.

Having concluded our discussion of this phase of the case, we turn our attention to the evidentiary rulings attacked by defendants.

*EVIDENTIARY RULINGS*

Defendants first challenge as unfairly prejudicial the introduction of evidence concerning the conditions in segregated confinement, particularly as to Sousa's concededly "grotesque, horrifying and dramatic" testimony that he was locked up at DSU Bridgewater for virtually twenty-four hours a day for six months, in a cell that was located under a ward for violent, uncontrollable mental patients, that was saturated with excrement and urine, and that had no plumbing and almost no furnishings. This evidence was highly relevant to the theory of recovery already discussed and central to plaintiffs' proof of damages. The probative value of this evidence was substantially outweighed by the danger of unfair prejudice in admitting it. Fed. R. Evid. 403.

More persuasive is defendants' claim that the trial court erred in admitting an affidavit by Claude Cross, an attorney who was dead at the time of trial. In this affidavit, Cross stated that he went to see Sousa at Walpole on April 1, 1970, at the request of Dr. Miriam Van Waters, who had received a phone call on Sousa's behalf. Cross further stated that Sousa complained to him that letters



he had written to Dr. Van Waters and Judge Wyzanski had been suppressed. Cross recalled asking Deputy Superintendent Butterworth about this and noted his response: "Butterworth replied that he had withheld one or two letters to Dr. Van Waters but had sent along the last one. He also said that he had refused to allow a petition to Judge Wyzanski to be mailed because allegations in it reflected badly upon the institution."

The Cross affidavit was very damaging to Butterworth's credibility. Butterworth had testified that he did not recall intercepting any of Sousa's letters, although he had then been forced to admit, when shown an affidavit he, himself, had executed in 1970, that he had returned the first letter to Van Waters and had asked Sousa to delete the name of an officer he implicated in brutality.

The Cross affidavit was not offered, however, merely to impeach Butterworth. Instead, it was offered under Rule 804(b)(5) of the Federal Rules of Evidence, as substantive evidence that Butterworth suppressed Sousa's mail. Rule 804(b)(5) creates an exception to the hearsay rule for an unavailable declarant's

> statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

The rule conditions the admissibility of the statement upon pretrial notice.

> However, a statement may not be admitted under this exception unless the proponent of it makes known to

the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Defendants contend that the Cross affidavit was inadmissible under Rule 804(b)(5) because it was not trustworthy and because plaintiffs did not give the requisite pretrial notice that it would be offered. We are troubled by the trial judge's treatment of both of these issues.

In determining that the affidavit was sufficiently trustworthy, the trial judge relied heavily upon the fact that he knew Cross well, as a very honorable man. This approach was of questionable propriety, because the trial judge was not a witness and his knowledge of Cross was not subject to judicial notice. *See* Fed. R. Evid. 201; 603; 605. As to the lack of pretrial notice, the trial judge made no findings and demonstrated limited concern. He offered defense counsel a week's continuance to meet the Cross affidavit, but undercut the offer with a demand that counsel explain on the spot what he would be able to do with the time ("You can't dig up Mr. Cross").

Despite our reservations about the trial judge's handling of the Cross affidavit, we uphold its introduction under Rule 804(b)(5). There were many indicia of the affidavit's trustworthiness. Defense counsel himself conceded that its author was an "eminent attorney." As an attorney, Cross could not have failed to appreciate the significance of the oath he took in executing the affidavit and, as such, was not a person likely to make a cavalier accusation against a prison official. As he explained in his affidavit, he had successfully defended Dr. Van Waters before a special commission that investigated her removal as the superintendent of MCI Framingham. Although he went to see Sousa at the behest of Dr. Van Waters, Cross was



basically a disinterested party; he was not Sousa's attorney and apparently had no connection with his lawsuit beyond submitting an affidavit.[12] Apart from these indications that the affiant was trustworthy, there were factors supporting the reliability of his statement that Butterworth admitted intercepting Sousa's mail to Dr. Van Waters and Judge Wyzanski. Cross, of course, had personal knowledge of Butterworth's admissions. As the trial judge noted in admitting the affidavit, Butterworth's own memory was poor, and his eventual admission on the witness stand that he brought one letter to Dr. Van Waters back to Sousa lent impressive support to the reliability of the Cross affidavit. All of this is not to say that Cross' recollection could not have been questioned, especially on the ground that his affidavit was executed nearly eight and one-half months after his conversation with Butterworth. Nevertheless, we think that there was a sufficient threshold showing of trustworthiness and that, beyond this, it was for the jury to decide the weight to be given the affidavit. The defendants cite no cases that persuade us otherwise, and comparison of this case to cases from other circuits only confirms us in our view. *E.g., Copperweld Steel Co.* v. *Demag-Mannesmann-Bohler,* 578 F.2d 953, 964 (3d Cir. 1978); *United States* v. *West,* 574 F.2d 1131, 1134-36 (4th Cir. 1978); *United States* v. *Medico,* 557 F.2d 309, 315-17 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977); *United States* v. *Ward,* 552 F.2d 1080, 1082 (5th Cir.), *cert. denied,* 434 U.S. 850 (1977); *United States* v. *Carlson,* 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (trustworthiness upheld). *Compare United States* v. *Bailey,* 581 F.2d 341, 348-50 (3d Cir. 1978); *United States* v. *Gonzalez,* 559 F.2d 1271, 1273-74 (5th Cir. 1977) (trustworthiness found lacking).

---

[12] The evidence indicated that, after seeing Sousa and Butterworth, Cross called State Police Officer Reilly and then did nothing other than submitting his affidavit.

The failure of the plaintiffs to give pretrial notice that they would use the Cross affidavit also poses a serious problem. Just how strictly Rule 804(b)(5)'s pretrial notice provision should be enforced has been a matter of debate. After reviewing the legislative history of Rule 804(b)(5) and Rule 803(24), the identical provision for statements of available declarants, the Second Circuit concluded in two cases that Congress intended the pretrial notice provision to be rigidly enforced and that evidence proffered without pretrial notice must be excluded. *United States* v. *Ruffin,* 575 F.2d 346, 357-58 (2d Cir. 1978); *United States* v. *Oates,* 560 F.2d 45, 72-73 n.30 (2d Cir. 1977).[13]

[13] The legislative history of Rules 804(b)(5) and 803(24) can be summarized as follows. The House of Representatives deleted the forerunners of these residual hearsay provisions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." H.R. Rep. No. 650, 93d Cong., 1st Sess. 5-6 (1973), *reprinted in* [1974] U.S. Code Cong. & Adm. News 7079. The Senate reinstated the provisions in a narrower form, believing that "exceptional circumstances" would on rare occasions justify the admission of hearsay not covered by other exceptions, and stating its expectation that "the court will give the opposing party a full and adequate opportunity to contest the admissibility of any statement sought to be introduced . . . ." S. Rep. No. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. Code Cong. & Adm. News 7051, 7065-66. The Conference Committee retained the provisions but added the pretrial notice requirement, without elaborating on the reason for the requirement. Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 1597, 93d Cong., 2d Sess. 13, *reprinted in* [1974] U.S. Code & Ad. News 7105-06. During the debates on the floor, two representatives who had participated in the conference commented upon the pretrial notice provision. Representative Hungate said of the notice requirement:

> We met with opposition on that. There were amendments offered that would let them do this right on into trial. But we thought the requirement should stop prior to trial and they would have to give notice before the trial. That is how we sought to protect them.

120 Cong. Rec. H12,256 (daily ed. Dec. 18, 1974). Representative Dennis said that, although he disliked the residual hearsay provisions, he thought that the insertion of a notice requirement so that counsel could get ready for such evidence was an adequate compromise. 120 Cong. Rec. H12,256-57 (daily ed. December 18, 1974).



A leading commentator has criticized this view as unnecessarily restrictive, admonishing that Rule 102 of the Federal Rules of Evidence requires that the Rules "be interpreted with a sense of trial realities, not like a bond indenture." 4 *Weinstein's Evidence* ¶803(24)[01], at 803-243 n.4f (4th ed. Supp. 1978).[14] Most courts have interpreted the pretrial notice requirement somewhat flexibly, in light of its express policy of providing a party with a fair opportunity to meet the proffered evidence. Thus, the failure to give pretrial notice has been excused if the proffering party was not at fault (because he could not have anticipated the need to use the evidence) and if the adverse party was deemed to have had sufficient opportunity to prepare for and contest the use of the evidence (for example, because he was offered a continuance, did not request a continuance, or had the statement in advance). *E.g., United States* v. *Bailey, supra,* 581 F.2d at 348; *United States* v. *Lyon,* 567 F.2d 777, 784 (8th Cir.), *cert. denied,* 435 U.S. 918 (1977); *United States* v. *Medico, supra,* 557 F.2d at 316 n.7; *United States* v. *Carlson, supra,* 547 F.2d at 1355; *United States* v. *Leslie,* 542 F.2d 285, 291 (5th Cir. 1976); *United States* v. *Iaconetti,* 540 F.2d 574, 578 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977).[15]

Even if we reject the Second Circuit's rigid interpretation of the pretrial notice requirement in favor of the prevailing flexible approach, the fly in the ointment in this case is that plaintiffs have never explained their failure to give pretrial notice. They cannot be presumed blameless.

[14] Rule 102 provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.

[15] Although *Medico* and *Iaconetti* are Second Circuit cases, neither is mentioned in *Oates* or *Ruffin.*

Nevertheless, on balance, we are persuaded that the lack of pretrial notice was not fatal.

Plaintiffs argue with some justification that defendants were not prejudiced by the failure to give notice because they were not, as they claim, surprised by the Cross affidavit. As plaintiffs point out, defendants had the Cross affidavit in their possession for seven and one-half years. It had accompanied plaintiffs' 1970 motion for injunctive relief, and Butterworth had specifically responded to it in his own affidavit (the one in which he admitted returning one of the letters to Van Waters). Furthermore, the second amended complaint alerted defendants that plaintiffs would make a major issue of Butterworth's suppression of Sousa's mail. But, most important, defense counsel's own comments indicated that he actually anticipated that evidence from Cross[16] would be offered; counsel said, "In inquiring into his background, I found he was a very eminent attorney."

We, therefore, find enough in the record to support an inference that counsel had prepared to meet the evidence in question, at least to the extent of investigating Cross' background, if not also to the point of reviewing prison mail records and contacting Judge Wyzanski's office.[17] Whatever deficiencies there were in defense counsel's preparation, such as a failure to review Butterworth's testimony about the affidavit with him in advance, we do not think they were fairly traceable to the failure to give pretrial notice. Finally, even if the court's offer of a continuance was somewhat abrupt, defense counsel showed little, if any, interest in that option, responding to the

[16] Conceivably, defense counsel had not learned that Cross was dead and expected that his testimony would be offered rather than his affidavit, but we are not convinced this is material.

[17] Indeed, we think any moderately prepared defense counsel in this case would have noticed Cross' affidavit and taken these steps.



court's query that "it would make no difference" if he were given a continuance.

In these circumstances, we are not inclined to read the notice provision of Rule 804(b)(5) to have mandated the exclusion of the Cross affidavit. If, in upholding the affidavit's admission, we are reading the rule somewhat more liberally than other courts, we do so because, unlike the vast majority of cases interpreting the rule, this is a civil case.[18] Where there is no constitutional right of confrontation implicated by the rule, we think slightly freer play can be given to the discretion of the trial judge in admitting evidence under it. *See United States* v. *Bailey, supra,* 581 F.2d at 350-51; *United States* v. *Medico, supra,* 557 F.2d at 314 n.4. Nevertheless, we warn parties that they fail to give pretrial notice under the rule at their peril, and we expect trial judges to consider carefully statements offered under residual exceptions to the hearsay rule.

The remaining evidentiary issues can be handled with greater dispatch. The next contested ruling is the trial judge's exclusion of several of Furtado's prior convictions (for escape, assault and battery on a guard, contributing to the delinquency of a minor, carnal abuse of a child, and larceny of a motor vehicle) and his exclusion of the fact that the prior assault and battery conviction of plaintiff's witness Allen, who testified that Sousa had been beaten, was for assault and battery on a prison guard. These convictions were offered under Rule 609(a) of the Federal Rules of Evidence, which provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprison-

[18] We also have considered that the affidavit was admissible in any event to impeach Butterworth.

> ment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Defendants contend that the trial judge had no discretion under Rule 609(a)(1) to exclude any of the prior convictions of plaintiff Furtado and witness Allen, since they were not defendants in the case. Plaintiffs' rejoinder is that the trial judge retained discretion under Rule 403 to exclude evidence on the ground that "its probative value is substantially outweighed by the danger of unfair prejudice." Although defendants may have a legitimate argument, we need not resolve the issue.

We think that whatever error there was in excluding some of Furtado's convictions and the precise nature of Allen's conviction for assault and battery was harmless, or, in the words of Rule 103(a) of the Federal Rules of Evidence, did not "affect a substantial right" of defendants.[19] The trial judge did admit five of Furtado's prior convictions (two for assault and battery, two for assault and battery with a dangerous weapon, and one for armed robbery) and three of Allen's convictions (for armed robbery while masked, burning a building, and assault and battery). Reference to an escape by Furtado was made in another witness' testimony. The jury could hardly have forgotten that the case arose in a prison setting and that virtually every one of plaintiffs' witnesses was a convict. Moreover, the excluded convictions were not particularly

[19] Rule 103(a) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]



probative of credibility.[20] In these circumstances, we think it somewhat strained for defendants to argue that their attack on Furtado's or Allen's credibility was significantly impaired, and we find no error warranting a new trial. *Compare United States* v. *Dixon*, 547 F.2d 1079, 1084 (9th Cir. 1976).[21]

Next defendants claim error in the admission of two memoranda written in 1971 by plaintiffs' witness Rosemary Adamo. Adamo was then a law student assisting plaintiffs' counsel. In that capacity, she twice interviewed an inmate named Thomas Murray, who told her that he had seen guards beat Furtado. Her memoranda of their conversations were admitted into evidence after Murray testified for defendants that he did not see Furtado beaten and had not spoken to Adamo about the incident.

Defendants do not deny that the Adamo memoranda qualified as recorded recollections under Rule 803(5) of the Federal Rules of Evidence, or that they were admissible to the extent that they contradicted Murray's testimony. Nevertheless, they assert that the court should at least have excised three prejudicial portions of the memoranda that were not inconsistent with Murray's testimony:

> In 1967 [Murray was] indicted for conspiracy and accessory for murder of an inmate. Never prosecuted but prison officials still use this as a threat.

[20] Defendants contend that Furtado's convictions for contributing to the delinquency of a minor, carnal abuse of a female child, escape, and larceny of a motor vehicle suggested "devious or deceitful conduct" on his part. Even if this can fairly be said of the latter two convictions, a point of which we are not persuaded, the escape was mentioned anyway and, as we read the record, the trial judge never made a definitive ruling on the escape and larceny of a motor vehicle conviction.

[21] We need not decide whether defense counsel failed to preserve objections to the exclusion of the prior convictions. It would have been better had counsel made it clear, after the *void dire* on this point, that he was pressing an objection, as was required in *Subzee* v. *Curtis*, 483 F.2d 263, 266 (1st Cir. 1973).

> Moore called Murray to his office and told him he wanted to press charges against the officers involved, which Murray didn't believe.
>
> He wouldn't give any names [of prison officers to the state police] though, or discuss it, because he was afraid of reprisal. He told them he didn't want to be found dead after "jumping off the third tier."

These portions of the memoranda were not highlighted as they were read to the jury, and the memoranda themselves were not made exhibits. Assuming *arguendo* that certain portions of the memoranda were inadmissible hearsay and were potentially prejudicial because they put prison officials in a bad light, defendants were adequately protected by the trial judge's contemporaneous cautionary instructions to the jury.[22]

Finally, defendants take issue with the trial judge's refusal to allow State Police Officer Philip Reilly to testify in rebuttal that Murray told him, two days after the incident, that he was being pressured by several inmates to say the guards were cruel and unreasonably abusive to Furtado. This evidence was offered prior to Adamo's testimony and excluded as premature, but, without waiving

[22] The judge, in part, told the jury:

> The only purpose of hearing what this young lady will tell you that Mr. Murray told her is for you to decide whether or not Mr. Murray was telling you the truth when he testified. If you find as a result of what she tells you that he was not telling the truth, then all of those, as to those particular matters, then all of those things go out of the case so far as Mr. Murray is concerned. And your mind remains a blank just as if he had never testified. You cannot use this contradiction, what the law calls impeachment, affirmatively in the case anymore. It's only with relation to whether or not you believe Mr. Murray.

The instructions make it unnecessary for us to discuss plaintiffs' contention that defendants failed to preserve this evidentiary point for appeal by specifying or moving to strike the offending portions of the memoranda.



objections to its admissibility, plaintiffs stipulated that the evidence could be offered, without recalling Reilly, after Adamo testified. Nevertheless, defense counsel forgot to offer it before he rested. It was within the trial judge's discretion to deny a motion to reopen the case on the following morning on the ground that to admit the evidence in splendid isolation would give it undue emphasis. *Ditter* v. *Yellow Cab Co.*, 221 F.2d 894, 899 (7th Cir. 1955). *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971).[23]

### *THE JURY INSTRUCTIONS*

Defendants challenge the trial court's instructions to the jury on two of the three aspects of the case: (1) the use of excessive force, and (2) the suppression of Sousa's mail.[24] Because defendants did not object to the instructions before the jury retired, as required by Rule 51 of the Federal Rules of Civil Procedure, we have only to decide whether the instructions given were plainly erroneous and necessitate reversal to prevent a clear miscarriage of justice. *Morris* v. *Travisono, supra,* 528 F.2d at 859; *Nimrod* v. *Sylvester,* 369 F.2d 870, 873 (1st Cir. 1966).[25]

On the claim of brutality, the trial judge impressed upon the jury that the issue was whether defendants had used unreasonable or excessive force. Quoting at length from Judge Friendly's opinion in *Johnson* v. *Glick,* 481 F.2d

[23] As the plaintiffs point out, the fact that Murray had told the state police he was under pressure from other inmates was mentioned in the Adamo memoranda.

> He said the statements in the police report about the fact he saw the officers use reasonable force to restrain and that he was being pressured by other inmates are false.

[24] Defendants make no complaints about the charge on the transfers to segregation.

[25] *Krock* v. *Electric Motor and Repair Co.,* 327 F.2d 213 (1st Cir.), *cert. denied,* 377 U.S. 934 (1964), relied on by defendants. is not to the contrary. That case did not involve an attack on the judge's charge on appeal.

1028, 1033 (2d Cir.), *cert. denied sub nom. John* v. *Johnson*, 414 U.S. 1033 (1973), he imposed a rather heavy burden on plaintiffs to establish the force used was unreasonable:

> By unreasonable force, I do not mean that you should draw fine, exact lines. A prison is not a social gathering. A wise judge has put it:
>
> "The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm."
>
> It would not be practical; it would hamstring a prison guard from using force at all when force was required if he had to fear a law suit every time. The law is not like that. I instruct you that the plaintiffs must show you that a guard used excessive force, excessive to the degree that a reasonable guard would realize, on the facts known to him when he did it, that it was excessive.

Although the standard for determining when a guard's application of force offends the eighth or fourteenth amendments is not easily formulated, the charge given here is perhaps open to criticism on the ground that it did not expressly require a finding that the force used was shocking or violative of universal standards of decency.[26] *See Meredith* v. *State of Arizona*, 523 F.2d 481, 482-84 (9th Cir. 1975); *Johnson* v. *Glick, supra*, 481 F.2d at 1033; *Howell* v. *Cataldi*, 464 F.2d 272, 282 (3d Cir. 1972). Nevertheless, we do not think the charge is any wider of the mark than the one in *Morris* v. *Travisono, supra*, 528 F.2d at 858, where we declined to invoke the plain error exception to Rule 51.[27] Nor are we impelled to find a clear miscarriage of justice, particularly in light of ample evidence that Furtado suffered a cracked jaw, bled profusely, and required hospitalization and pain medication for several days.



We come to a similar conclusion after examining the court's instructions on the suppression of Sousa's mail. In essence, the court charged that Butterworth was liable for damages if he suppressed the second letter Sousa wrote to Dr. Van Waters and the letter Sousa wrote to Judge Wyzanski. The defendants claim the instruction was erroneous because it deprived Butterworth of his qualified immunity defense, by failing to take into account that the law concerning prisoners' correspondence rights was unsettled in March, 1970, and by failing to require a finding of malice.

Although we agree that Butterworth could assert qualified immunity unless he knew or should have known he was violating Sousa's rights, *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978), and that the rights of prisoners to send routine correspondence were unclear until 1974, *Procunier* v. *Martinez*, 416 U.S. 396, 406-07 (1974), we find no plain,

---

[26] To the contrary, the court indicated that punitive damages could be imposed if the jury found the conduct shocking or outrageous; the jury awarded no punitive damages for the beatings.

[27] In *Morris*, an instruction that the jury could impose liability if it found that prison guards used tear gas against nonthreatening prisoners "for the mere purpose of punishing them" was said to lower the threshold of cruel and unusual punishment.

reversible error in the instruction given. In the first place, we are not convinced an instruction on qualified immunity was required. In testifying, Butterworth did not rely on this defense, but rather denied intercepting the letters in question. Second, a strong argument can be made that Butterworth should have known that intercepting these letters would violate Sousa's right of access to the courts. Both letters contained requests for legal assistance, and one was directed to a federal judge. By 1970, it was well settled that a prisoner's right of access to the courts included the right to mail legal petitions to court without having prison officials screen them, *Ex parte Hull*, 312 U.S. 546 (1941), and the right of access to legal assistance, *Johnson* v. *Avery*, 393 U.S. 483 (1969). *See Nolan* v. *Scafati*, 430 F.2d 548, 550-51 (1st Cir. 1970) (holding, four months after Sousa wrote his letters, that *Johnson* v. *Avery* clearly meant an inmate had the right to write to the Civil Liberties Union for legal assistance). *Compare Procunier* v. *Navarette, supra*, 434 U.S. at 565 n.12. Finally, because the jury expressly found that Butterworth recommended segregation for Sousa because of his letter writing and assessed punitive damages, it is highly unlikely that a charge requiring it to find Butterworth acted maliciously would have made any difference.

### *PREJUDGMENT INTEREST AND ATTORNEY'S FEES*

We now consider whether prejudgment interest was properly assessed and attorney's fees were correctly computed. To the award of $27,500 in damages, the trial judge added approximately $14,900 in prejudgment interest, a sizeable amount that reflected this case's slow progress to trial. The trial judge's reason for adding prejudgment interest is not stated in the record. From the calculations made, however, it appears that he believed Massachusetts



law controlled this point and that the pertinent statute, Mass. Gen. Laws ch. 231, § 6B, mandated prejudgment interest.[28]

We first decide whether Massachusetts law was appliable. Although state law governs the imposition of prejudgment interest in diversity cases, *Hobart* v. *O'Brien*, 243 F.2d 735, 745 (1st Cir. 1957), it has not been applied in cases arising under federal law. *Sanabria* v. *International Longshoremen's Association Local 1575*, 597 F.2d 312, 313-14 (1st Cir. 1979); *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F.2d 893, 894-97 (1st Cir. 1953). In civil rights cases brought under 42 U.S.C. § 1983, courts are required by 42 U.S.C. § 1988 to look first to federal law on all matters, but to turn to the law of the forum state if federal law does not cover the issue.

> The jurisdiction . . . conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . .

---

[28] Chapter 231, § 6B provides:

> In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added . . . to the amount of damages interest thereon from the date of commencement of the action.

Effective August 14, 1974, the rate of prejudgment interest was increased from 6% to 8%. 1974 Mass. Acts, ch. 224, § 1. The trial judge accordingly provided for interest at 6% prior to August 14, 1974, and 8% thereafter.

> is held, so far as the same is not inconsistent with the Constitution and laws of the United States shall . . . govern[.]

42 U.S.C. § 1988. Whether state prejudgment interest law applies in this case therefore hinges on whether federal law on the subject is viewed as "deficient." *See Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978).

We rule that resort to state law on prejudgment interest was not required. Although we have found no cases on point, several Supreme Court opinions are instructive. On one hand, the Court has applied state survivorship law and statutes of limitations in federal civil rights litigation. *Id.* at 594-95; *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462-66 (1975). On the other hand, the Court has indicated that federal courts should fashion appropriate rules for damages in section 1983 actions. *Carey* v. *Piphus*, 435 U.S. 247, 257-59 (1978). *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-40 (1969). We think that the issue of prejudgment interest is closely allied with that of damages, and that a federal rule should, therefore, be developed for an action under 42 U.S.C. § 1983. This is altogether in keeping with the approach to prejudgment interest in *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947), where, in barring prejudgment interest on penalties exacted under the Agricultural Adjustment Act, the Supreme Court said, "in the absence of an unequivocal prohibition of [prejudgment] interest . . . , this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principles deemed relevant."

Declaring that a federal rule should govern prejudgment interest in civil rights actions under 42 U.S.C. § 1983 is easier than formulating a rule. There are, of course, three options: prejudgment interest could be (1) mandatory,



(2) discretionary, or (3) barred. We find little to recommend a mandatory rule. The injuries suffered by plaintiffs in civil rights actions are often intangible, and prejudgment interest will not always be necessary to compensate them fully. *See Moore-McCormack Lines, Inc.* v. *Amirault*, *supra*, 202 F.2d at 895. Assuming that prejudgment interest can also legitimately have a punitive purpose when a defendant has obstinately delayed payment to an injured party, *see Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970, 976 (1st Cir.), *cert. denied*, 409 U.S. 876 (1972), such interest will not be warranted in every case. By the same token, we have reservations about an inflexible rule barring prejudgment interest in a section 1983 action. Such a rule is arguably appropriate because section 1983 creates a species of tort liability, and prejudgment interest on the typical unliquidated tort claim was not recoverable at common law. *Id.* at 976; *Moore-McCormack Lines, Inc.* v. *Amirault*, *supra*, at 897. Nevertheless, the traditional common law view has been criticized, *see id.* at 898; D. Dobbs, *The Law of Remedies* § 3.5, at 173-74 (1st ed. 1973), and common law tort rules, although a useful starting point for fashioning remedies for section 1983 violations, are not binding. *Carey* v. *Piphus*, *supra*, 435 U.S. at 258-59.

We need not decide between a rule making prejudgment interest discretionary and one barring it altogether. Assuming *arguendo* that prejudgment interest was discretionary, federal law dictated that the jury should decide whether to assess it. *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048, 1053 (1st Cir. 1973); *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F.2d 732, 735 (2d Cir. 1955); *Parisi* v. *Lady in Blue, Inc.*, 433 F. Supp. 681, 682-83 (D. Mass. 1977). But the question of prejudgment interest was not submitted to the jury, nor did plaintiffs ask that the jury be instructed on it. Consequently, the award of prejudgment interest

must be stricken. *Robinson* v. *Pocahontas, Inc., supra,* at 1053.[29]

There remains the question of attorney's fees, which were awarded to plaintiffs' two lawyers under 42 U.S.C. § 1988. The trial judge awarded $13,750, a figure arrived at by halving plaintiffs' dollar recovery. In settling upon this novel formula, the court took the position that it would be unfair to make defendants pay more than plaintiffs would have paid counsel had they been able to retain counsel on a contingency basis. Aware that this approach might be rejected on appeal, the court made an alternative finding that "counsel legitimately put $20,000 worth of work into the case, timewise."

We are constrained to remand. Although the half the dollar recovery formula has beguiling simplicity and resulted in a substantial award here, we cannot accept it. Quite apart from the fact that the formula would work obvious injustice in cases where damages were nominal or only injunctive relief was sought, or in cases where recovery was large and out of proportion to the work done, we eschewed such simple formulae in *Kring* v. *Greenblatt,* 560 F.2d 1024 (1st Cir. 1977), *cert. denied,* 98 S. Ct. 3146 (1978). There, we held that in awarding fees the court must "adhere carefully" to the twelve criteria that were set forth in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974), and approved by Congress. Because the fifty per cent of recovery formula ignores time and labor spent, as well as other factors, it cannot stand.

Nor are we sure that the alternative award of $20,000 reflects consideration of each of the pertinent criteria. True, plaintiffs' counsel directed the court's attention to *King* v. *Greenblatt, supra,* and provided relevant documentation, and the court touched upon some of the proper criteria in its opinion (for example, stating that the representation given was highly qualified). But, because the trial judge found that counsel put $20,000 worth of work into the case "timewise," we are left to wonder whether this figure only reflects the hours spent.

[29] We do not think Rule 49(a) of the Federal Rules of Civil Procedure is to the contrary. That rule provides that, when a jury is asked to return a special verdict, the court may decide any issue of fact not presented to the jury.



Accordingly, we remand the case for further consideration of the attorney's fees. Upon remand, the district court should also determine, after appropriate documentation is submitted, what attorney's fees are due plaintiffs' counsel for the appellate work that has now been put into the case.

To sum up, the portion of the judgment imposing prejudgment interest is stricken and the portion of the judgment relating to attorney's fees is vacated and remanded for further consideration. In all other respects, the judgment of the district court is upheld.

SO ORDERED.

# APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

---

Civil Action No. 70-1805-G

JOHN FURTADO and
GERALD SOUSA,
PLAINTIFFS,
*v.*
HAROLD BISHOP et al.,
DEFENDANTS.

---

## JUDGMENT

This action came on for trial before the Court and a jury, Honorable Bailey Aldrich, Senior Circuit Judge,* presiding, and the jury having duly rendered its special verdicts in answers to interrogatories submitted by the Court, and the Court, in its opinion of July 11, 1978, having awarded attorney's fees and other costs,

I. It is Ordered and Adjudged that Judgment is entered for the Plaintiff, John Furtado, against the defendants, specified below, who are jointly and severally liable for the amounts indicated:

A. For improper physical force, $8,000.00, with interest at the rate of 6% from December 8, 1970 to August 14, 1974 in the amount of $1,772.64, and interest at the rate of 8% from August 14, 1974 to August 14, 1978 in the amount of $2,560.00, and attorney's fees in the amount of $4,000.00, and costs in the amount of $87.59 for a total judgment in the amount of $16,420.23:

| | |
|---|---|
| Harold Bishop | Michael Gilmore |
| William Butler | Thomas McLaughlin |
| Donald Camara | James Medas |

---

* Sitting by designation.

Philip Carvalho — Roger Paley
Lee Davis — Laurence Scholes
Leo Flanagan

B. For making intentionally false reports or recommendations with the purpose or expectation that they would lead to segregated confinement, $1,000.00, with interest at the rate of 6% from December 8, 1970 to August 14, 1974 in the amount of $221.58, and interest at the rate of 8% from August 14, 1974 to August 14, 1978 in the amount of $320.00, and attorney's fees in the amount of $500.00, and costs in the amount of $10.84, for a total judgment in the amount of $2052.42:

Fred Butterworth — Laurence Scholes

II. It is Ordered and Adjudged that Judgment is entered for the Plaintiff, Gerald Sousa, against the defendants, specified below, who are jointly and severally liable for the amounts indicated:

A. For improper physical force, $4,500.00, with interest at the rate of 6% from December 8, 1970 to August 14, 1974 in the amount of $997.11, and interest at the rate of 8% from August 14, 1974 to August 14, 1978 in the amount of $1,440.00, and attorney's fees in the amount of $2,250.00, and costs in the amount of $49.36, for a total judgment in the amount of $9,236.47:

Harold Bishop — Wilfred Forcier
William Butler — John J. Kalinowski
Leo Flanagan — Rene Saulnier

B. For making intentionally false reports or recommendations with the purpose or expectation that they would lead to segregated confinement, $9,000.00 with interest at the rate of 6% from December 8, 1970 to August 14, 1974 in the amount of $1,994.22, and interest at the rate of 8% from August 14, 1974 to August 14, 1978 in the



amount of $2,880.00, and attorney's fees in the amount of $4,500.00, and costs in the amount of $98.43, for a total judgment in the amount of $18,472.65:

Fred Butterworth — Rene Saulnier

C. For mail suppression and for recommending segregation because of writing letters, $5,000.00, with interest at the rate of 6% from December 8, 1970 to August 14, 1974 in the amount of $1,107.90, and interest at the rate of 8% from August 14, 1974 to August 14, 1978 in the amount of $1,600.00, and attorney's fees in the amount of $2,500.00, and costs in the amount of $54.78, for a total judgment in the amount of $10,262.68:

Fred Butterworth

Dated at Boston, Massachusetts, this 12th day of September, 1978.

GEORGE F. MCGRATH, Clerk
By (s) DANIEL A. (Illegible)
*Deputy Clerk*

APPROVED AS TO FORM
(s) JOSEPH L. GORDON, JR., Asst. AG 9-6-78
*Counsel for Defendants*

APPROVED AS TO FORM
(s) BAILEY ALDRICH
*United States Circuit Judge*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 70-1805-G

JOHN FURTADO and
GERALD SOUSA,
PLAINTIFFS,
*v.*
HAROLD BISHOP et al.,
DEFENDANTS.

## OPINION

April 20, 1978

Before addressing the several post-trial motions for new trial, entry of judgment, etc., I review the background. Plaintiffs either originated, or quickly subscribed to the idea of special interrogatories to the jury, and submitted a proposed set on Friday afternoon, March 24. On Monday afternoon I submitted my response, which was, essentially, merely a revision as to form. Comments by both sides resulted in a few more changes, with the final draft furnished counsel Tuesday prior to summation. No objections were noted to the final form, and no exceptions were taken to the charge.

I did make one reservation, which was that the submission of the interrogatories to the jury did not constitute a ruling that, as to every defendant, the evidence warranted an affirmative answer. This automatically saved defendants' rights as to the sufficiency of the evidence. It did not save their rights as to form. Thus their present complaint as to the inadequacy of question No. 1 would come too late, even if it had merit. In point of fact it has none; the meaning of "improper physical force," which was in my draft from the beginning, was fully defined in the charge.



The objection to question No. 2 is equally late. However, it, too, lacks merit.

If question No. 9 should have been spelled out in the charge as requiring bad faith on the part of Butterworth, he did not request it. In any event, by awarding punitive damages, the jury found it. I cannot say its findings were unwarranted.

It is not only defendants who failed to complain about the questions. There is nothing about these questions and answers which supplies affirmative support to plaintiffs' present contention that all defendants who were guilty as to say, Sousa, must nevertheless be charged as to Furtado because they conspired with the Furtado defendants. This additional claim, even if possible, was not put to the jury, and no argument that the jury's findings must be supported requires this one. If this was a permissible inference, the jury was not asked it, and did not answer it.

If it be said that this is an unanswered and open issue of fact, to be resolved by the court now that the jury is functus officio, I answer it against the plaintiffs, in part because that answer is not only consistent with the jury's negative findings as to such individuals, but also because of the jury's failure to find punitive damages in this area. If there was a conspiracy from the beginning, punitive damages would well have been in order. Defendants specifically asked me to charge the jury that it could find that the enterprise started out legitimately and that the guards became overannoyed in the middle of it. This was a legitimate possibility. Having seen Furtado, I consider it quite possible. It is perhaps not as easy to believe this about Sousa, but I cannot say the jury could not do so. All this leads away from finding the type of umbrella conspiracy that plaintiffs now advance, and I reject it.

Nor do I accept plaintiffs' argument that participating in a coverup automatically makes each participant respon-

sible for the penalties meted out to the plaintiffs. I carefully separated this issue into questions 5 and 6, and the jury conspicuously distinguished.

The affidavit of Attorney Cross was a disaster for Butterworth, but it bore all the earmarks of admissibility under the new rules. If the Court of Appeals should disagree with me, however, Butterworth should get a new trial on questions 9—11, as it infected them all.

I agree with Butterworth that answer 11's compensatory damage award was, at best, a duplication, and is to be disregarded. I cannot fairly say that any of the other damage findings are so excessive that they must be set aside. Finally, defendants' general objections that the evidence was insufficient to support the jury's findings are without merit.

Judgments will be entered in accordance with this opinion after the matter of counsel fees has been settled. The court tentatively envisages a separate fee with respect to the Furtado defendants ,the Sousa defendants, and as to questions 9—11. Possibly there should be even more distribution, in the interest of fairness to individual defendants. In some cases I have found counsel able to settle this issue inter sese, and if there is any hope of that here, it might be to everyone's advantage. I make the general comment that the amount of recovery is an important factor in my mind.

Orders on the several pending motions will ultimately be made, consistent with this opinion.

(s) ALDRICH
*U.S. Circuit Judge**

---

* Sitting by designation.

---



## APPENDIX C

UNITED STATES CONSTITUTION, AMENDMENT VIII:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

UNITED STATES CONSTITUTION, AMENDMENT XIV,

SECTION 1 (in relevant part):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

TITLE 42, UNITED STATES CODE, § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FEDERAL RULES OF EVIDENCE, RULE 804(b)

(in relevant part):

> (b) Hearsay Exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

---